UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

MANUELLA DIONISIO REED,	)	
	)	
PLAINTIFF	)	
	)	
v.	)	**Civil No. 98-450-P-H**
	)	
LEPAGE BAKERIES, INC.,	)	
	)	
DEFENDANT	)	

ORDER ON DEFENDANTS' MOTION TO DISMISS

This mental disability discrimination case potentially raises difficult and important issues under the Americans With Disabilities Act ("ADA"), 42 U.S.C. § 12101-12213. What is the scope of an employer's ability to discipline a mentally disabled individual for insubordination allegedly caused by the disability, and what is the scope of the duty of reasonable accommodation toward an employee whose condition assertedly requires that she be permitted to walk away from stressful situations?[1] The only question before me now, however, is whether the plaintiff's complaint can survive a motion to dismiss for failure to state a claim. It can.

Whether or not the evidence ultimately will bear her out, the plaintiff has alleged that

1. She suffers from a mental disability that

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[1] For a general discussion of the caselaw, see Karen Dill Danforth, Note, Reading Reasonableness out of the ADA: Responding to Threats by Employees with Mental Illness Following *Palmer*, 85 VA. L. REV. 661 (1999); Stephanie Proctor Miller, Comment, Keeping the Promise: The ADA and Employment Discrimination on the Basis of Psychiatric Disability, 85 CAL. L. REV. 701 (1997). See also EEOC, Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (1999) Q&A 34, 35 (dated Mar. 1, 1999); <http://www.eeoc.gov/docs/accommodation.html>; EEOC, Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities Q&A 30, 31 (dated Mar. 25, 1997) <http://www.eeoc.gov/docs/psych.txt>.

2. requires her to be permitted to walk away from stressful situations; and that
3. she requested such an accommodation from her employer; and that
4. her employer agreed to such an accommodation; but that
5. a supervisor later reneged on the accommodation and required her to remain in a stressful situation; and that
6. as a result there was an outburst in which she uttered several profanities to her supervisor, resulting in her
7. being first escorted from the building and then fired.

For purposes of the 12(b)(6) motion, the employer concedes that

1. the employee has a disability;
2. she is a qualified individual within the meaning of the ADA; and
3. she was subjected to an adverse employment decision.

The employer seeks dismissal of the complaint only on the ground that it fired the employee for misconduct, not on account of her disability. But the employer fails to deal with both the plaintiff's reasonable accommodation argument and whether it evenhandedly disciplined both disabled and nondisabled employees for insubordination.

Although the caselaw may recognize a few instances where employers need not engage in any accommodation—*e.g.*, threats of violence, see Palmer v. Circuit Court, 117 F.3d 351 (7th Cir. 1997), cert. denied, 118 S. Ct. 893 (1998); illegal conduct, see Harris v. Polk County, 103 F.3d 696 (8th Cir. 1996)[2]—I am not prepared on these pleadings to say that insubordination belongs on that list.[3]

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[2] Some courts have held an accommodation to be unreasonable *per se* if it conflicts with a bona fide seniority system. See Willis v. Pacific Maritime Ass'n, 162 F.3d 561, 566 (9th Cir. 1998); Shea v. Tisch, 870 F.2d 786, 789-90 (1st Cir. 1989).

[3] The First Circuit has rejected the argument that "conduct connected to a disability always must be considered to be action 'because of' a disability" as "too broad a formulation" for ADA purposes. EEOC v. Amego, Inc., 110 F.3d 135, 149 (1st Cir. 1997). Amego left open the possibility that the ADA might prohibit discharge based on "certain conduct which is in fact more closely compelled by the disability," id., suggesting that the employer's implicit assertion here that discipline for misconduct is never to be considered "because of" a disability is also too broad a formulation. The Tenth Circuit has held that disability-caused misconduct is not necessarily "beyond the pale of ADA protection." Den Hartog v. Wasatch Academy, 129 F.3d 1076, 1087 *(Continued next page)*

The motion to dismiss is **DENIED**.

SO ORDERED.

DATED THIS 3RD DAY OF AUGUST, 1999.

D. BROCK HORNBY
UNITED STATES CHIEF DISTRICT JUDGE

(10th Cir. 1997). At least at this stage of the ADA's development, therefore, it seems appropriate to rest any decision on a developed factual record—not yet available in this case.